IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 3140 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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JITUBHAI R PARMAR - Petitioner(s)

Versus

PROJECT TECHNOLOGIST PVT. LTD. - Respondent(s)

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Appearance :

MR RD RAVAL for Petitioner(s) : 1,

MRS ARTI H NANAVATI for Respondent(s) : 1,

MR HJ NANAVATI for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 18/01/2006

ORAL JUDGMENT

Heard learned advocate Mr. R.D. Raval for petitioner and Mr. H.J. Nanavati for respondent. This petition under Article 226, 14 and 21 of Constitution of India is filed by one Jitubhai R. Parmar against Project Technologist Pvt. Ltd. Respondent raised industrial dispute before conciliation officer. Ultimately, industrial dispute about termination was referred to for adjudication to labour court, Baroda being Reference No. 577/92, new reference No. 1079/97. Labour Court dismissed said reference in absence of petitioner for default by order dated 12th December, 1995 and Miscellaneous Application filed by petitioner with a prayer to set aside said order is rejected by labour court by order dated 19th May, 2003. Said order dated 19th May, 2003 is under challenge in this petition. Respondent has filed affidavit in reply and has

raised preliminary contention and submitted that in exercise of powers under Article 227 of Constitution, this Court may not interfere with the order of labour court; petition is not maintainable. Second contention s that the labour Court Baroda has not committed any error, therefore, no interference is warranted. Then, respondent has mentioned certain facts that manufacturing activities are not going on but discontinued and it is closed since 31st December, 2001 changing scenario and now it is difficult for company to continue its activity. On 10.4.2001, Company has written letter to the GE Board to discontinue High Tension Electric Supply provided at the place where manufacturing activity of company is located. It is also submitted that the workman was negligent and was intentionally not remaining present before court, therefore, no opportunity is required to be given to workman by restoring original reference. It is alleged that the petitioner wants some monitory

benefit any how and that is why proceedings are continued against respondent.

Mr. Raval, learned advocate for petitioner submits that labour court has no jurisdiction to pass such order dismissing reference for default of workman but it is duty of labour court to decide matter and adjudicate reference referred to for adjudication. He submits that labour court has committed gross error in dismissing reference in default on the part of workman. He submits that there was no intentional lapse on the part of workman but since his advocate was not remaining present, matter came to be dismissed. According to his submission, for the fault on the part of his advocate, workman should not be made to suffer. Therefore, it is his request to allow this petition by restoring main reference and to direct labour court to decide it on merits within some stipulated period.

Learned advocate Mr. Nanavati for respondent vehemently opposed submission of learned advocate Mr. Raval and submits that petitioner is interested in money and he is not interested in job; company has been closed as per the affidavit filed by respondent. Electricity connection is also disconnected by GE Board. In short, it is his submission that the petition may be dismissed and labour court has rightly passed order rejecting application filed by petitioner.

I have considered submission made by learned advocates. I have also perused petition and reply filed by respondent. I have perused order of labour court in Miscellaneous Application No. 142 of 2000 in Reference No. 577 of 1992 dated 19th May, 2003.

Labour court has observed that when workman was reporting for work, he was not allowed to report for work. He was remaining absent only on

one occasion and in his absence, reference has been dismissed for default. It is also observed by labour court that this reference was dismissed twice in absence of workman. Initially on 12th December, 1995, reference no. 577 of 1992 was dismissed for default which was restored on file and newly numbered as 1079 of 1997. Labour court has considered reference. It came to conclusion that the workman was not remaining present before labour court on each and every occasion and it is not proper for workman to remain absent, therefore, workman has shown negligence twice and, therefore, reference was dismissed for default, therefore, application is rejected.

Labour court has considered that reference was dismissed in default twice in absence of workman. Workman was remaining negligent.

Considering observations made by labour court, question arising for consideration is,

whether labour court has jurisdiction to dismiss reference in default. Is there any other provision which would give power to labour court to dismiss reference in default of workman. Answer given by Karnataka High Court in N.M. Naik versus The Presiding Officer, Labour Court, teabli and Another, 1997 (77) FLR 914, Karnataka. In Divisional Railway Manager versus Secretary, 2001 (3) GLH 513 (Gujarat)also, same question is examined. This Court examined it in Mohitosh Dass and M.G. Memon and another, 2004 (103) FLR 119 that labour court has no jurisdiction to dismiss reference in default without adjudication. In paragraph 13 and 14 of decision in Mohitosh dass and MG Memon and another (supra), this Court observed as under:

> "13. But while considering the decision of this Court, Karnataka High Court and the High Court of Calcutta, an important question which arises for consideration of this Court that once reference has been made by the appropriate Government under Section 10 of the Industrial Disputes Act, 1947 for adjudication, then, the labour court or industrial tribunal should have to adjudicate the dispute on merits. The question is that after Reference has been made according to the procedure, the labour court received the Reference and issued notice to the workman and the employer mentioning the date of

filing of the statement of claim as well as written statement and also indicating the date of hearing but in case if the workman has not remained present on the date of hearing though notice has been received by the workman and as such, no statement of claim is filed by the workman upto the date of hearing, and though notice has been received by the employer and no written statement is filed by the employer and not remained present before the labour court on the date of hearing, then, according to the procedure and to follow the principles of natural justice, the labour court will issue another two or three notices to the concerned party with direction to remain personally present before the concerned labour court or industrial tribunal and to prosecute their remedy under the Law. But inspite of such two or three notices served on the employer and the workman and if none of the parties practically not remains present before the labour court or the industrial tribunal and even no statement of claim is filed by the workman for any reason that the dispute is raised by the Union merely taking signature on paper by Union, or the workman may not be aware as to the proceedings or some time the workman left the Union or left place of working or go to native place, or some time the workman die or change the place of residence, under any of these circumstances in which though notices served on the workman, the reference is pending before the concerned labour court and industrial tribunal. Similarly, in respect of the employer also, some time the employer has lost interest in such reference because the company is closed or company may be under B.I.F.R. proceedings or employer has changed or for some other reason like death of the employer or some unavoidable and inevitable circumstances, meaning thereby, non appearance of the workman and the employer before the labour court though notice is served by the labour court received by both respective parties then, in such circumstances, how the labour court can deal with the matter and decide the reference on merits when there is no material before the labour court as none of the parties has produced any material before the labour court or the industrial tribunal. This is the real difficulty being faced by the labour court now-a-days and some time the labour court is helpless in passing the award on merits when there is no material placed before the labour court by either party. In such cases, the view which is already taken that once the Reference has been referred to the labour court for adjudication then the labour court have no powers to pass order or award in absence of the workman but the labour court should have to decide the Reference on its merits but in above circumstances, in absence of the material, on what basis, the labour court can examine the merits of the Reference when nothing on record except the order of Reference. Therefore, in such helpless situation, how can it be expected from the labour court to decide the matter on merits. Such situation creates difficulty when no material is placed before him by either of the party. If such order is passed, this Court has taken the view

that labour court having no jurisdiction to dismiss the matter in default but he should have to decide the Reference on merits. This situation has not been visualized that after referring the matter to the labour court, none of the party represents their case inspite of receiving the notice/s then the labour court having only the order of Reference except no other record. Therefore, relevant provisions of the Rules 26, 26-A and 26-B of the Rules require to be referred and it is discussed as under :

Rule 26 of the Industrial Disputes Gujarat Rules, 1966 provides that if without sufficient cause being shown, any party to a proceeding before a Board, Court, Labour Court, Tribunal or any Arbitrator fails to attend or to be represented, the Board, Court, Labour Court, Tribunal or Arbitrator may proceed ex-parte.

Rule 26-A provides that on an application made within thirty days from the date of knowledge of an ex-parte order, award or report by the party concerned, the Board, Court, Labour Court, Tribunal or Arbitrator may, for sufficient cause, set aside, after notice to the opposite party, such order, award, or report as the case may be. The labour court can extend the period of limitation and such application must have to be filed with an affidavit and the labour court having power to stay operation of an award, conditionally or otherwise in appropriate cases, until the application for setting aside ex parte orders is disposed off finally as provided under Rule 26-B of the Rules.

14. Therefore, bare reading of Rule 26, 26-A and 26-B, the labour court having powers to proceed exparte if any party fails to attend or to be represented before the labour court. Exparte order, award or report can be set aside by the labour court after issuing notice to the opposite party and meanwhile, that order can be stayed by the labour court. But before the labour court, except the order of Reference, when there is no material is placed by either party and inspite of various notices issued by the labour court and received by the respective parties, even though, they are not appearing or attending or representing, then, how the labour court can deal with such situation. If some material is placed by the employer, then the labour court can certainly examine such material and pass order on merits either way. Similarly, if the workman places some material and the employer remains absent, the labour court can definitely pass exparte award relying upon the material placed by the workman. But when both the parties remain silent and not attending the proceedings and represented by any one, in such circumstances, how the labour court can deal with such references when the labour court having no jurisdiction to dismiss the matter in default. With a

view to deal with such situation, which is really a need for disposal of such long pending references before the labour court and industrial tribunals, this Court has given thoughtful consideration on this issue. Moreover, the view taken by this Court and the various High Courts, such references are piling and pending before the labour court where neither of the parties remains present and attending the Reference. There are number of References are pending where notices have been served on the workman as well as employer but none of the parties filed their appearance and remained present before the labour court. In such pending cases, if the labor court passes any order dismissing the matter in default, the view taken already settled by various High Court would come in their way and ultimately the matter must have to be decided on merits. Therefore, according to my opinion, this being present position and various references of such nature, which are pending before the various labour court in State of Gujarat but because of lack of any guidelines and no proper understanding and clarification on this issue, the labour courts are not passing any order and matters are kept in cupboard since five to eight years and some matters are very old pending for more than ten years. That is how, according to my opinion, if in such circumstances, when the labour court merely having order of reference and no material received from either party, then the labour court should have to consider the file which has been sent by the Conciliation Officer along with the order of Reference where all the details of the workman are given that how long service he has put with the employer by the workman, what was his designation, what was the last salary, how many workmen are working, what is the date of termination and what was the salary and on what ground his service came to be terminated or dismissed by the employer. Taking said details from the prescribed form which is annexed to the order of Reference being B-file of Conciliation Officer, the labour court can deal with the matter in a manner that after the order of Reference has been referred to and the same has been received by the labour court, the labour court has issued this many number of notices to both the parties and necessary acknowledgment of each notices on record and inspite of this much time, no efforts have been made by either of the party to attend the proceedings or to represent their case before the labour court. Therefore, considering this fact, the labour court should observed that there is no material with the labour court to decide the merits of either side and ultimately challenge is from the workman on the ground that the order of termination / dismissal or discharge is bad in law. But the labour court shall have to consider that looking to the facts on record and in absence of the material, workman has failed to satisfy the labour court that dismissal or discharge or termination is illegal in any manner, meaning thereby, that order of termination / discharge and / or dismissal is passed by the employer, is legal and valid and on that term, the labour court can

dispose of the reference on merits coming to the conclusion that the order of dismissal / termination is legal and valid passed by the employer. According to my opinion, such finding that the workman has not sufficiently and satisfactorily justified the order of dismissal, discharge or termination is illegal and result thereto, the labour court can hold that the order of dismissal, discharge and termination is found to be legal and valid. This being positive finding of the labour court on the Reference which can be considered to be an award within the meaning of Section 2[b] of the Industrial Disputes Act, 1947. Therefore, in such references which are not represented or attended to by either party and remained as it is, the labour court can adopt such course and record finding to the effect that and ultimately their positive finding would satisfy the meaning of the award under Section 2[b] of the Industrial Disputes Act, 1947. While disposing such pending references, where no party is being attended to by either party, would not violate and / or against the view taken by this Court and various High Courts. Therefore, instead of passing the order of dismissal for default, the labour court should pass detail order with positive finding that dismissal, discharge and / or termination is held to be legal and valid by the labour court. This can be a practical solution, according to my opinion, to dispose of number of references which are lying in cupboard of the labour court for pretty long time and the labour court is not disposing of because of the view taken by this Court and other High Courts. It is also necessary to note that if either party places on record the material then, it is very reasonable to rely such material and to pass appropriate orders on merits which naturally an Award within the meaning of Section 2[b] of the Industrial Disputes Act, 1947. It is very clear from Rule 26 of Industrial Disputes Gujarat Rules, 1966 that the labour court may proceed exparte against any party to a proceeding which includes the workman and the employer also. Similarly, Rule -26A of the Rules also provides the same situation that application may be filed by party concerned for setting aside the exparte order, award or report, means, exparte order. In other words, it cannot be understood in the spirit of the provisions of the Code of Civil Procedure. Here the exparte award means it can be passed even against the workman also who has raised the industrial dispute. Under the Code of Civil Procedure, "exparte" means proceedings against the opposite party in absence, but in the Industrial Dispute Gujarat Rules, 1966, the provisions is otherwise, and exparte proceedings could be against both the parties, even against the employer and workman also. Therefore, there is difference and the labour court can pass exparte order against either party and party concerned can file appropriate application for setting aside the award. Therefore, right has been given to both the parties in case if exparte order is passed against any of the parties. Therefore, if the labour court passes an award

> having positive finding in absence of the material and ultimately the workman having any grievance due to some circumstances not able to attend or to be represented the case before the labour court, then he is entitled to file such application under Rule 26-A of the I.D.Act, 1947 and therefore in such situation, the workman is not remained without any remedy and can file appropriate proceedings before the very court with a prayer to set aside the exparte award. Therefore, considering the difficulty being faced by the labour court and the industrial tribunal where number of references of such nature are pending and the labour court is not passing any order because of the decision of this Court on the ground that the labour court having no jurisdiction to pass order of dismissal for default but this Court has discussed this issue and in such circumstances, where the workman and the employer both remain absent inspite of service of notice on both the parties and when no material is placed on record by either of the party, the labour court can adopt such course and can come to the conclusion that the order of termination / discharge or dismissal is found to be legal and valid as the workman is not able to satisfy and establish the order of termination, discharge or dismissal bad in the eye of law. Therefore, considering all these practical difficulties being faced by the labour courts and the tribunals, this Court has discussed this issue and visualized the situation to find out the way out in absence of specific remedy under the Act and the Rules to enable the labour courts and the tribunal to dispose of such pending references, which are not attended to and represented by none of the parties.""'

There is no provision in ID Act as well as Gujarat Rules 1966 empowering labour court to dismiss reference in default of workman. Contention to that effect has been raised by petitioner in para 5 of petition. Therefore, in view of this decision, labour court has no power or jurisdiction to dismiss reference in default of workman but it is the duty of labour court to decide and adjudicate it on merits even in

absence of workman. Second reason is that if advocate or representative of workman is remaining absent, then, for fault on the part of advocate, workman should not be made to suffer but opportunity has to be given to workman by imposing certain cost on workman for restoring reference. It is desirable to decide reference on merits rather than dismissal thereof for default on the part of workman or his advocate. Therefore, considering all these facts and decision of this court that labour court has no jurisdiction to dismiss matter for default and simultaneously workman was not at fault but his advocate was negligent in appearing before labour court, this court is of opinion that one opportunity should be given to workman. Therefore, contentions raised by Mr. Nanavati are rejected. Therefore, considering these facts, order passed by labour court in Miscellaneous Application No. 142 of 2000 in Reference No. 577 of 1992 (Newly numbered as Reference No. 1079 of

1997) dated 19th May, 2003 is required to be set aside.

Consequently, this petition is allowed. Order of labour court dated 19.5.2003 in Miscellaneous Application No. 142 of 2000 in Reference No. 577 of 1992 is set aside. Reference No. 1079 of 1997 (Old No.577/92) is restored to original file before labour court, Baroda. The Labour Court, Baroda is directed to decide this reference on merits or adjudicate dispute as per reference made by appropriate Government after giving reasonable opportunity to both the parties within six months from the date of receipt of copy of this order. Rule is made absolute in terms indicated herein above. It is clarified that this Court has passed this order without examining merits of matter between parties and this court has not expressed any opinion about merits of matter, therefore, labour court will decide reference strictly in accordance with law and

material on record.

Registry of this Court is directed to pay amount of Rs.2500.00 (Rs.two thousand five hundred only) deposited by petitioner in Registry of this Court to respondent Project Technologist Private Ltd. By way of an account payee cheque. Cheque be handed over to learned advocate Shri H.J. Nanavati who will accept it on behalf of respondent Company.

(H.K. Rathod,J.)

Vyas